(3)

No. 03-1515

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# In The
# Supreme Court of the United States

CITY OF MCALESTER, ET AL.,

*Petitioners,*

v.

PITTSBURG COUNTY RURAL
WATER DISTRICT NO. 7, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether the Tenth Circuit gave appropriate preclusive effect to "deannexation orders" entered by a state administrative body?

## PARTIES TO THE PROCEEDINGS

The Petitioner has properly identified the parties.

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## OPINIONS BELOW

The Petitioners properly set forth the "Opinions Below" with the following corrections:

- At page 2 the Petitioners erroneously assert that the Tenth Circuit invalidated judgments (deannexation orders) entered by state courts and a state administrative body – the Board of County Commissioners. The record demonstrates the Tenth Circuit upheld the deannexation orders, but found that such orders could not be used as a basis to defeat Pitt-7's federal rights under 7 U.S.C. § 1926(b).

## JURISDICTION

The Petitioners' Statement of Jurisdiction is correct.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLDED

The Petitioners' statements of Constitutional and Statutory Provisions involved is correct.

## STATEMENT OF THE CASE

This action began in 1997, when Pittsburg County Rural Water District No. 7 (Pitt-7) filed a complaint asking the U.S. District Court for the Eastern District of Oklahoma to enjoin McAlester's water sales to industrial facilities located in the Taylor Industrial Park ("Park"), as well as several other properties. [Appendix B to Petition

for Writ of Certiorari, at p. 7a.] McAlester developed the Park in 1981 and has been serving water to Park occupants since that time. [Appendix D to Petition for Writ of Certiorari, at p. 99a].

Pitt-7 requested the injunction based on its claim of an exclusive right to serve water within its geographic territory. [Appendix B to Petition for Writ of Certiorari, at p. 7a.] The geographic territory of Pitt-7 (which includes all the properties in dispute) was drawn in 1966 when Pitt-7 was formed by an order of the Pittsburg Board of County Commissioners ("Board of Commissioners"). [Appendix D to Petition for Writ of Certiorari, at p. 95a.]

Pitt-7's claim of an exclusive right to serve the Park and other properties is based on 7 U.S.C. § 1926(b) ["§ 1926(b)"]. [Appendix B to Petition for Writ of Certiorari, at p. 7a.] Section 1926(b) is part of the Consolidated Farm and Rural Development Act ("CFRDA").[1] Through the Farmers Home Administration (FmHA),[2] the CFRDA provides direct loans and loan guaranties to rural water associations. These loans are to provide for the "conservation, development, use, and control of water."[3] FmHA loans are typically used by rural water associations for development and improvement of water systems, including laying

[1] 7 U.S.C. § 1921 *et seq.*

[2] As stated by the Tenth Circuit, "FmHA loans are now administered by the United States Department of Agriculture. *See* Pub. L. No. 103-354 (1994)." [Appendix B, at page 6a.] As the Tenth Circuit did the Petitioners will refer to the "creditor entity" as the FmHA. [*Id.*]

[3] 7 U.S.C. § 1926(a)(1).

water lines to new areas where rural water services are needed.[4]

Section 1926(b) provides protection from competition to public entities that accept federal loans for the construction of water distribution facilities in rural areas. Section 1926(b) prohibits the limitation or curtailment of water service that is provided or made available by the borrower – in this case, Pitt-7. McAlester argues that to come within the prohibition, the limitation or curtailment of water service must be accomplished through "inclusion of the area served . . . within the boundaries of any municipal corporation or other public body, or by the granting of any franchise for similar service within such area during the term of such loan." This argument is in error. Virtually every Court which has addressed the application of the federal statute has held it must be interpreted and applied broadly to preclude curtailment or limitation of service provided or made available by an indebted association whether technically by annexation, grant of a franchise *or otherwise*, i.e., no matter what form the curtailment or limitation may take.[5]

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[4] See, e.g., *Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 972 F. Supp. 951, 956 (E.D.N.Y. 1997) (describing usage by a rural water association of CFRDA – borrowed money, initially "to fund [the association's] water system," and later to fund an expansion of the association's water system into a new area).

[5] See *City of Madison v. Bear Creek Water Ass'n*, 816 F.2d 1057, 1059 (5th Cir. 1927), holding that § 1926(b) precludes competition no matter whether by competing franchises, new or additional permit requirements or similar means and that to read a loophole into this absolute prohibition would render nugatory the clear purpose of § 1926(b); *Rural Water Dist. #3 v. Owasso Utilities Authority*, 530 F.Supp. 818 (N.D. Okl. 1989) holding § 1926(b) precluded competition with the

(Continued on following page)

In 1997, the Board of Commissioners entered two orders removing certain lands – including the Park – from Pitt-7's geographic boundaries. The issue raised in this case is whether the deannexation orders terminated Pitt-7's legal right to sell water in the affected areas, and/or otherwise ended Pitt-7's § 1926(b) protection as to those areas. Thus, the real issue presented is whether the state (acting through its agency, Pitt-7) can borrow federal funds and pledge as part of the collateral to the federal government its legal right to serve an area, and then subsequently (acting through the Board of Commissioners) unilaterally take away that right and thus extinguish the federal government's collateral.

The orders entered by the Board of Commissioners followed an adversarial hearing in which Pitt-7 argued that § 1926(b) precluded the removal of lands from Pitt-7's state-law geographic territory. The Board of Commissioners rejected Pitt-7's objection and entered orders removing certain land from Pitt-7's territory. However, the Board of Commissioners did *not* make any findings or conclusions related to the application of § 1926(b) or the effect of state law deannexation on Pitt-7's § 1926(b) rights.

In appellate proceedings before the state district court and later before the Oklahoma Court of Civil Appeals and the Oklahoma Supreme Court, Pitt-7 and the Landowners litigated the issue of Pitt-7's failure to perfect a timely

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association although the competition was not the result of annexation or grant of a franchise; and *Jennings Water, Inc. v. City of North Vernon*, 682 F.Supp. 521, 425 (S.D. Ind. 1988) holding that § 1926(b) protection should not be narrowly construed to prohibit municipal competition only if technically by annexation or grant of franchise.

appeal. However, contrary to McAlester's argument, Pitt-7 and the Landowners did not litigate the preclusive effect of the Board of Commissioners' orders pursuant to § 1926(b). Indeed, any findings or conclusions by the Appellate Courts which held that the deannexation orders are not subject to collateral attack or an equitable challenge, such as declaratory relief, was beyond the issue on appeal, i e., whether the appeal was timely commenced.

The Tenth Circuit did not disregard the decision by the Oklahoma administrative agency (Board of Commissioners) or the Oklahoma appellate courts. The Tenth Circuit's decision did not erroneously invalidate the effect of the Board of Commissioners' orders and the subsequent orders and judgments on appeal from those orders.

Pitt-7 brought this federal action to enforce its 7 U.S.C. § 1926(b) rights. After commencement of this action, the Landowners filed petitions for deannexation under state law with the Board of Commissioners, seeking to have their land removed from the state geographical boundaries of Pitt-7. The filing of the deannexation petitions was an attempt to remove Pitt-7's legal right to sell water in the area under state law, and thus remove Pitt-7's § 1926(b) protection.

After the filing of the deannexation petitions, Pitt-7 amended its Federal Complaint, seeking a declaration that the Board of Commissioners' power to deannex was preempted by § 1926(b) and/or that even if deannexation was granted the order would not affect Pitt-7's § 1926(b) rights to be the exclusive water provider in the deannexed area so long as Pitt-7 remained indebted to the federal government. This is so because: (1) deannexation under state law would not remove Pitt-7's legal right to sell water in the

area and (2) that if deannexation would normally allow the imposition of a state law which would preclude Pitt-7 from serving the area, such state law is preempted.

Simultaneously, Pitt-7 asserted in the Board of Commissioners' proceeding that the power of the Board of Commissioners to deannex was preempted by § 1926(b), and alternatively that deannexation was not proper under the state law standard.

The district court held the deannexation orders to be final, and that deannexation under state law removed Pitt-7's § 1926(b) protection.

The Tenth Circuit gave preclusive effect to the deannexation orders noting that "Thus, the district court was (and is on remand) bound under the full faith and credit statute *not* to overturn the Board's deannexation." Appendix A to Petition for Writ of Certiorari, at p. 25a. However, the Tenth Circuit also held that the question of whether the deannexation orders themselves could be overturned was not the end of the inquiry. The Tenth Circuit correctly held that although the state deannexation orders were final, that deannexation under state law *after* an association becomes indebted on a federal loan could not be used to defeat the association's federal rights. Appendix A to Petition for Writ of Certiorari, at p. 25a.

## I. THE TENTH CIRCUIT GAVE APPROPRIATE PRECLUSIVE EFFECT TO THE ISSUES DECIDED BY THE BOARD OF COMMISSIONERS

The Tenth Circuit did *not* overturn or fail to give proper preclusive effect to the Board of Commissioners'

orders of deannexation. Indeed, the Tenth Circuit specifically held that Pitt-7's request for relief to strike the deannexation was barred. Appendix A to Petition for Writ of Certiorari, at p. 25a.

However, the Tenth Circuit did find that the § 1926(b) issues in this case were not raised and could not have been raised or decided in the Board of Commissioners proceedings, and thus the orders in those proceedings had no preclusive effect on Pitt-7's claims in Federal Court.

### A. THE BOARD OF COUNTY COMMISSIONERS HAD NO JURISDICTION AND DID NOT DECIDE THE QUESTION OF WHETHER DEANNEXATION UNDER STATE LAW COULD AFFECT AN ASSOCIATION'S § 1926(b) RIGHTS

The Tenth Circuit (giving proper preclusive effect to the issues resolved in the Board of Commissioners proceeding) held that Pitt-7 could not challenge the deannexation, i.e., that Pitt-7 could not challenge whether deannexation was appropriate under the state law standard or whether deannexation itself was preempted: "Thus, the district court was (and is on remand) bound under the full faith and credit statute *not* to overturn the Board's deannexation" Appendix A to Petition for Writ of Certiorari, at p. 25a. (Emphasis Added).

However, in relation to the question concerning what effect the deannexation had in relation to Pitt-7's § 1926(b) rights, the Tenth Circuit properly held that this question was not presented to and could not have been presented to the Board of Commissioners because it is beyond the Board of Commissioners' limited jurisdiction.

The Tenth Circuit correctly observed that the Board of Commissioners is not a state court of general jurisdiction, but rather a state agency with narrow and specific jurisdiction as to deannexation. The Board of Commissioners' jurisdiction in a deannexation proceeding is limited to determining whether deannexation is appropriate under the state law standard, i.e., whether the granting of the petition is in the best interests of the affected landowners and the district. Appendix A to Petition for Writ of Certiorari, at pp. 22a-23a.

The statutory provision which grants to the Board of Commissioners jurisdiction to decide deannexation issues provides that if the Board of Commissioners finds "the granting of the petition is to the best interest of the affected landowners and the district, the board of county commissioners *shall* issue a certificate stating the lands involved are released and separated from the district." 82 O.S. § 1324.21. (Emphasis Added).

No power is conferred upon the Board of Commissioners to decide any other issue of state or federal law. Thus, *if* the state statutory requirements are met, the Board of Commissioners "shall" (must) grant deannexation regardless of whether deannexation is precluded due to the application of some other state or federal law. The Tenth Circuit so recognized:

> Regardless, though, of the resolution of that question, the Board's order does not preclude Pitt-7's claims in this case because it did not resolve the merits of any of the *§ 1926*, federal or state antitrust claims at issue in this action. The Board merely found that the statutory standard for deannexation – that "the granting of the petition is to the best interests of the affected landowners

> and the district," *Okla. Stat. Ann. Tit. 82, § 1324.21* – was satisfied, and the Board thus granted the deannexation petition. *See* Aples' Supp.App. at 355 (Certificate Releasing Lands, issued Jun. 27, 1997). In contrast, the questions before us concern primarily the legality under the federal law of sales by McAlester before and after the deannexation to customers within Pitt-7's territorial border as it stood on June 15, 1994, the date Pitt-7 entered into an FMHA loan. Accordingly, issue preclusion flows from neither the proceedings before the Board nor the proceedings before the Oklahoma courts to bar Pitt-7's claims in this case.

Appendix to Petition for Writ of Certiorari, at p. 21a.

### B. THE BOARD OF COUNTY COMMISSIONERS LACKED JURISDICTION TO DETERMINE IF DEANNEXATION WAS PRECLUDED OR VOIDED BY FEDERAL LAW

Although not necessary to uphold the Tenth Circuit's decision, to the extent the Tenth Circuit held that deannexation itself is preempted and is thus void, such decision is likewise not precluded by the Board of Commissioners' decision.

For the Board of Commissioners' deannexation order to bar Pitt-7's claims under the doctrine of res judicata there must exist (1) identity of subject matter, of the parties or their privies, of the capacity of the parties and of the cause of action, (2) the Court which heard the original action must have been one of competent jurisdiction and (3) the judgment must be a final judgment rendered on the

merits of the case. *Carris v. John R. Thomas & Associates*, 896 P.2d 522, 527 (Okl. 1995).

The jurisdiction of the Board of Commissioners is limited, i.e., it is not a state court with general jurisdiction. The subject matter jurisdiction conferred upon the Board of Commissioners was solely to review the record and decide whether deannexation "is to the best interests of the affected landowners and the district." Title 82 O.S. § 1324.21 Nowhere within the powers granted to the Board of Commissioners are they given jurisdiction to decide questions of federal law or even other questions of state law.

Because the Board of Commissioners lacked jurisdiction to hear the issue of whether federal law preempts the Board of Commissioners' authority to remove customers and service areas from an indebted association, such orders cannot be given res judicata or preclusive effect as to § 1926(b) rights involved here.

A void judgment cannot constitute res judicata and may be vacated at any time. Title 12 O.S. § 1038; *Bruce v. Miller*, 360 P.2d 508 (Okl. 1961) and *Lehman v. Tucker*, 55 P.2d 62 (Okl. 1936). A judgment by a court without jurisdiction is void and does not operate as res judicata or collateral estoppel. *Landy v. First Nat. Bank & Trust of Tulsa*, 386 P.2d 987 (Okl. 1962); *Wisel v. Terhune*, 204 P.2d 286 (Okl. 1949) and *Stevens v. Patten*, 50 P.2d 1106 (Okl. 1935); See also, *Bruce v. Miller*, 360 P.2d 508 (Okl. 1961); *Davis v. Sulton Oil Co.*, 881 P.2d 763 (Okl. App. 1994); citing *Abraham v. Homer*, 102 Okl. 12, 226 P.45, 47 (1924); *Mayhue v. Mayhue*, 706 P.2d 890, 895 (Okl. 1985) and *Barton v. Alpine Investments, Inc.*, 596 P.2d 532, 534 (Okl. 1979).

Pitt-7 has the right to litigate the question of whether § 1926(b) preempts the Board of Commissioners' order of deannexation to the extent the order serves to diminish Pitt-7's 1926(b) rights. The Tenth Circuit was obligated to hear Pitt-7's argument and make a decision on the merits:

> "Where a defendant by answer pleads and relies for a defense upon a judgment which, if valid, would be a defense against the plaintiff's cause of action, plaintiff has a right by reply to challenge the validity of that judgment, and the proceedings under which it was obtained, and to plead that it is void. Where he does this, it is the duty of the court to inquire into that judgment and the proceedings by which it was obtained." *St. Louis-San Francisco Ry. Co. v. Bayne*, 170 Okl. 542, 40 P.2d 1104.
>
> "The jurisdiction of any court exercising authority over any subject may be inquired into in every other court when the proceedings of the former are relied on and brought before the latter by a party claiming the benefit of such proceeding."

*Mayfield v. L.V. French Truck Service, Inc.*, 369 P.2d 461, 462-463 (Okl. 1961).

McAlester raised the defense that the decision by the Board of Commissioners precluded Pitt-7's § 1926(b) claims. Pursuant to *Mayfield*, when this occurs, Pitt-7 has the right to challenge the prior decision and "it is the duty of the court to inquire into that judgment and the proceeding by which it was obtained."

## II. THE TENTH CIRCUIT CORRECTLY DETERMINED THAT 7 U.S.C. § 1926(b) PREEMPTS APPLICATION OF A STATE LAW AFTER DEANNEXATION WHICH WOULD LIMIT OR CURTAIL THE SERVICE PROVIDED OR MADE AVAILABLE BY PITT-7

McAlester argues that a state (acting through an association such as Pitt-7 here) may borrow money from the federal government and pledge as security its customers, facilities, service area, and legal right to serve and after accepting the benefits of the loan may unilaterally (acting through the Board of County Commissioners) take away part of that collateral.

The argument violates all recognized principals of law relating to contracts and lending transactions. It also violates and contradicts the recognized purposes of § 1926(b):

(1) to protect the indebted association from competition,

(2) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and

(3) to safeguard the viability and financial security of such associations (and FmHA's loans).

*Rural Water Dist. No. 1 v. Wilson*, 243 F.3d 1263, 1269 (10th Cir. 2001).

This is not an instance where the state altered the service area of an association before it became indebted to the federal government and pledged its service area and legal right to serve to the federal government. This is not a

case where the state sought to alter the service area of an association, before the association was entitled to § 1926(b) protection.

Pitt-7 had the legal right to serve customers at the time it became indebted [and pledged its assets including its legal right to serve to the federal government] and at the time the customers requested water service. Under these circumstances, state law cannot be invoked to remove the indebted association's legal right to serve, thereby defeating its § 1926(b) rights.

The Tenth Circuit has previously recognized that by allowing an association (Pitt-7) to borrow federal funds, the state and all of its subdivisions and agencies, accept the conditions of such loans:

> Oklahoma thus authorized District No. 2 to borrow from the federal government and to enter into any required agreements in connection with those loans. In so doing, Oklahoma through its authorized entity District No. 2 bound itself and all of its subdivisions, including the City of Glenpool, to the condition it accepted.

*Glenpool Utility Services Authority v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1216 (10th Cir. 1988).

McAlester's argument that these obligations do not apply to the Board of Commissioners, is in direct conflict with *Glenpool*.

The language of § 1926(b) is not limited to municipalities or to curtailment or limitation of service resulting from annexation by a city:

> The service provided or made available through any such association shall not be curtailed or

> limited by inclusion of the area served by such association within the boundaries of any municipality corporation *or other public body, or by the granting of any private franchise for similar service within such area* during the terms of the loan . . .

By seeking to remove territory and customers from Pitt-7's geographical boundaries, the Board of Commissioners (i.e. the State) seeks to grant a franchise to McAlester to sell water to those customers.

Every Court which has addressed § 1926(b) has held its provisions are to be construed broadly to preclude competition, no matter what form it might take, whether it be by annexation, grant of a franchise *or otherwise*. See *City of Madison v. Bear Creek Water Ass'n*, 816 F.2d 1057, 1059 (5th Cir. 1927), holding that § 1926(b) precludes competition no matter whether by competing franchises, new or additional permit requirements or similar means and that to read a loophole into this absolute prohibition would render nugatory the clear purpose of § 1926(b); *Rural Water Dist. #3 v. Owasso Utilities Authority*, 530 F.Supp. 818 (N.D. Okl. 1989) holding § 1926(b) precluded competition with the association although the competition was not the result of annexation or grant of a franchise; and *Jennings Water, Inc. v. City of North Vernon*, 682 F.Supp. 521, 425 (S.D. Ind. 1988) holding that § 1926(b) protection should not be narrowly construed to prohibit municipal competition only if technically by annexation or grant of franchise.

Courts have traditionally looked to state law to determine the legal right to serve. However, the time for this determination is at the time the loan was obtained and such right was pledged to the federal government as

collateral and any attempt to take away that right thereafter and while the loan remains outstanding is preempted. *Rural Water System #1 v. City of Sioux Center*, 967 F. Supp. 1483, 1529 (N.D. Iowa 1997).

Under the "Pipes In The Ground Test" [as adopted by the Tenth Circuit in *Sequoyah County Rural Water District No. 7 v. Town of Muldrow*, 191 F.3d 1192 (10th Cir. 1999)] state law is only important to determine if the association had the legal right to sell water to a given customer. The "Pipes In The Ground Test" requires the association have the legal right to sell water to the customer under state law and the physical ability to provide service. Thus, state law does not determine the dimensions of the § 1926(b) protected service area, but is only important to determine if the association had the legal right under state law to sell water to a customer.

The "legal right" prong of the "made service available" requirement is determined by state law at the time the association first became indebted and any state law which would purportedly take away that right after such date is preempted by federal law:

> What the court is saying is that there is no express preemption of state law that defines the service area of an association *at the moment the association becomes indebted to the United States and is thereby entitled to the protection of §1926(b).*
>
> * * *
>
> It does not expressly prohibit a state-law definition of the existing service area of an association *at the moment the association can invoke the protections of §1926(b) by becoming indebted to the United States.* Nor is there conflict preemption,

> because the federal statute certainly does not prohibit a definition of the service area of an association by state law *prior to the association becoming indebted. Rather, state law that defines the service area of an association prior to or at the time it becomes indebted is state law that stands outside the window of §1926(b) preemption* and also is state law that can reasonably coexist with the federal law.
>
> * * *
>
> Second, the court is not saying that state law can be used to justify a municipality's encroachment upon disputed area in which an indebted association is legally providing service under state law. *The state law used to justify the encroachment would clearly conflict with or stand as an obstacle to, the non-encroachment provisions of §1926(b), and consequently would be preempted by superior federal* law in the form of §1926(b). See, e.g., Kinley Corp., 999 F.2d at 358 n. 3; Hankins, 964 F.2d at 861. *Therefore, there is express and conflict preemption of any state law that purports to take away from an indebted association any territory in which the association has both a legal and physical ability to provide service at the time the association is first entitled to invoke the protection of §1926(b).*

*Rural Water System #1 v. City of Sioux Center*, 967 F.Supp. 1483, 1529 (N.D. Iowa 1997) (Emphasis Added).

McAlester's reliance on *Sioux Center II* is misplaced. The discussion in *Sioux Center II* did not relate to the legal right or service area issues, but concerned whether the service provided by the association was "adequate", noting that "questions as to the adequacy of water service to be

provided is within the exclusive jurisdiction of the appropriate regulatory agencies." Thus, the Court would defer to regulatory agencies (state and federal) to determine the adequacy of service, i.e., what minimum pressure should be provided and what degree of purity is required. *Sioux Center II*, at pp. 993-995.

McAlester's reliance on the *dissenting opinion* in *Rural Water District No. 1 v. Wilson*, 243 F.3d 1263, 1276 (10th Cir. 2001) is likewise misplaced. The majority rejected Judge Briscoe's position and concluded the cost of service is a factor in determining whether service has been made available for the purpose of § 1926(b) protection. By doing so, the majority rejected Judge Briscoe's argument that a state cause of action to remove the customer from the association's state service area would have an effect on the association's § 1926(b) protected service area.

If imposition of a state law would preclude Pitt-7 from serving an area and thus eliminate Pitt-7's § 1926(b) protection, it is the precise type of statute preempted by § 1926(b), because it grants the city a franchise to sell water in what would otherwise be Pitt-7's § 1926(b) protected service area and/or places new and additional requirements on the association, i.e., to have the customer re-annexed into the water district. McAlester fails to cite any authority which is contrary to the Tenth Circuit's decision in this case that once an association becomes indebted to the federal government and pledges its service area and/or right to serve as collateral, the state cannot take away that service area and/or legal right to serve, so long as the association remains indebted to the federal government.

McAlester relies on *Rural Water And Sewer District #4 v. Coppage*, 2002 OK 44, 47 P.2d 872 (2002). However,

*Coppage* expressly excluded any ruling on the effect of federal law [§ 1926(b)] on the right of the state to deannex after § 1926(b) protection has attached. *Coppage* at fn. 3. Furthermore, the Oklahoma law at issue in *Coppage* is significantly different from the protection provided by § 1926(b). The state law protects only the water district's "existing customers", [*Coppage*, at p. 4]. § 1926(b) protects both the association's existing customers and its "potential customers".[6]

The imposition of a state law to take away customers and service area of an indebted association *after* the association has become indebted and after § 1926(b) protection has attached falls squarely within the prohibitions of § 1926(b).

Contrary to McAlester's argument, it makes no difference whether the Board of Commissioners is a competitor or whether it merely opened the door (i.e. granted a franchise) for other competitors to compete with the federally indebted association.

Once the state allows its agency (Pitt-7) to borrow federal funds and pledge its right to sell water as part of

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[6] Section § 1926(b) provides that "The service provided or made available . . . shall not be curtailed or limited . . . ". The reference to "service provided" references "existing customers", whereas the phrase "made available" references "potential customers". See *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 915 (5th Cir. 1996) and *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230, 233 (6th Cir. 1996) holding that § 1926(b) has two purposes, including, "to encourage rural water development by expanding the number of *potential users* . . . ". (Emphasis Added).

the collateral, the state and its subdivisions accept all the obligations which come with such borrowing, which includes the obligation to not curtail or limit the service provided or made available by such association. This includes the obligation to not curtail or limit the association's legal right to sell water.

If McAlester's position was followed to its logical conclusion, the state (through its agency, Pitt-7) could borrow money from the federal government and pledge its customers and legal right to serve as collateral for that loan and later unilaterally reverse course and remove the association's legal right to serve, thereby eliminating the collateral for the loan. This would be an absurd result.

## CONCLUSION

The Tenth Circuit gave proper preclusive effect to the Board of Commissioners' orders of deannexation. However, the Tenth Circuit also properly held that deannexation under state law, (*after* an association borrows money from the federal government and pledges to the federal government its service area and legal right to sell water), cannot be used as a basis to eliminate such collateral and to circumvent or defeat the protection afforded by § 1926(b). The Tenth Circuit's decision on this issue is consistent with all cases which have addressed the issue. There is no conflict between the Circuits on this issue.

WHEREFORE, McAlester has failed to present any basis for granting the requested Writ of Certiorari, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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